

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
December 14, 2009 Session

**TIMOTHY TODD v. MTD CONSUMER GROUP ET AL.**

**Appeal from the Chancery Court for Lauderdale County  
No. 13148 Martha B. Brasfield, Chancellor**

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**No. W2008-02707-SC-WCM-WC - Mailed March 10, 2010; Filed May 13, 2010**

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Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. The employee fell from a platform at work. The injury was accepted by his employer as compensable. After a period of medical treatment, the authorized physicians released the employee to return to work with no permanent impairment or restrictions. The employee sought medical treatment on his own. Ultimately, he had surgery on his back and neck. He filed suit against his employer. Employee had two previous workers' compensation awards. Several months later, he amended his complaint to add the Second Injury Fund as a defendant. After a trial on the merits, the trial court found that the employee had sustained a compensable injury which resulted in an 85% permanent partial disability to the body as a whole. The court apportioned the award according to Tennessee Code Annotated section 50-6-208(b). It then dismissed all claims against the Second Injury Fund, based upon the statute of limitations. It awarded some medical expenses claimed by the employee, but denied others. On appeal, the employee asserts that the trial court erred by dismissing the claim against the Fund, by incorrectly determining the percentage of disability represented by his earlier settlements, and by declining to award all requested medical expenses. Finding no error, we affirm the judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court Affirmed**

JAMES F. BUTLER, SP. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J., and DONALD P. HARRIS, SR. J., joined.

Ricky L. Boren, Jackson, Tennessee, for the appellant(s), Timothy Todd.

Michael A. Carter, Milan, Tennessee, for the appellee(s), MTD Consumer Group and Liberty Mutual Insurance Company.

Robert E. Cooper, Jr., Attorney General & Reporter; Michael E. Moore, Solicitor General; Joshua Davis Baker, Assistant Attorney General, for the appellee, Tennessee Department of Labor and Workforce Development, Second Injury Fund.

## **MEMORANDUM OPINION**

### **Factual and Procedural Background**

Timothy Todd (“Employee”) worked for MTD Consumer Group (“Employer”) as a maintenance worker beginning in 2002. His job consisted primarily of repairing and maintaining robotic assembly machines. He was injured on April 23, 2004, when he fell approximately five and one half feet from a platform, landing on his buttocks. He reported the incident immediately. Employee was sent initially to the local emergency room, and later that day Employer authorized him to see a primary care physician. Shortly thereafter, Employer sent him to Dr. Michael Glover, an orthopaedic surgeon.

Dr. Glover testified by deposition. He provided conservative treatment to Employee from May 11, 2004 until September 9, 2004. His diagnoses were cervical and lumbar strains. Dr. Glover ordered MRI studies of Employee’s cervical and lumbar spine. These showed disk protrusions at the C4-5, C5-6, and L5-S1 levels. Employee had previously undergone a cervical MRI in 2001 as a result of an automobile accident. Dr. Glover compared the 2001 and 2004 studies and concluded that the cervical disk protrusions had not progressed as a result of the work injury. He testified that the L5-S1 protrusion was on the left side of the spine, while Employee’s symptoms were on the right. For that reason, he did not consider the disk injury to be the source of the symptoms. Dr. Glover ultimately released Employee to return to work without restrictions in September.

Dr. Glover also referred Employee to Dr. Dirk Franzen, a neurosurgeon, for a second opinion evaluation. This occurred on June 1, 2004. Dr. Franzen also testified by deposition. In general, his conclusions were consistent with those of Dr. Glover.

After being released by Dr. Glover, Employee returned to work for one day. He testified that he was still having substantial pain. He spoke to Jim Kennedy, the plant nurse, and requested referral to an additional physician. Mr. Kennedy declined, stating that he “ha[d] to go by what Dr. Glover sa[id]. There’s nothing wrong with you.” Mr. Kennedy reportedly advised Employee to seek additional treatment through his health insurer. In November 2004, Employee contacted Employer’s workers’ compensation insurer seeking additional medical treatment. He received a letter shortly thereafter denying his request.

On December 28, 2004, Employee filed this civil action against Employer and its insurer, seeking “past and future medical, hospital, and prescription bills, additional temporary disability benefits, [and] permanent partial disability benefits . . . as provided by the Workers’ Compensation Laws of Tennessee.”

Employee thereafter sought medical treatment on his own. He initially saw Dr. Saeed, a neurologist. Dr. Saeed referred him to Dr. Autry Parker, a pain specialist, who in turn referred him to Dr. Fereidoon Parsioon, a neurosurgeon. Dr. Parsioon ordered cervical and lumbar myelograms. Based upon the results of those tests, he recommended two surgical procedures: a fusion of the C5-6 vertebrae and a laminectomy at L5-S1. These procedures were performed on April 22, 2005 and November 22, 2005, respectively. He also reviewed the previous MRIs of Employee’s cervical and lumbar spine. Based upon that comparison, and his observations during the two surgical procedures, Dr. Parsioon opined that the April 2004 work injury had advanced the pre-existing disk protrusion at C5-6 and had caused the L5-S1 disk rupture. Dr. Parsioon released Employee from his care on April 3, 2006. He assigned a combined impairment of 19% to the body as a whole. He also recommended permanent restrictions against lifting more than seventy-five pounds or working longer than eight hours at one time. As a result of Dr. Parsioon’s testimony, Employer accepted the claim as compensable.

Dr. Joseph Boals, an orthopaedic surgeon, conducted an independent medical evaluation on May 25, 2006, at the request of Employee’s attorney. Dr. Boals assigned a combined impairment of 35% to the body as a whole, and recommended that Employee avoid lifting weights in excess of twenty pounds. Dr. Boals also recommended that Employee not return to employment requiring manual labor.

On August 2, 2006, Employee filed a motion to add the Second Injury Fund as a defendant in this action. The motion was granted by the trial court on August 8, and an amended complaint, with the Fund as an additional defendant, was filed on August 22, 2006.

Employee had settled two previous workers’ compensation claims. In 1995, he settled a claim for an alleged back injury against Cadillac Curtain Company. A certified copy of the order approving the settlement was introduced into evidence. The settlement stated that all authorized medical expenses and temporary disability benefits had been paid, that Employee’s workers’ compensation benefit rate was \$120.00 per week, and that his claim was being settled for a total of \$13,000.00, and an additional \$1,000.00 in lieu of future medical benefits. Employee testified that a portion of the settlement amount was used to pay for unauthorized medical treatment.

Richard Murrell, Assistant Director of the Benefit Review Program for the Workers' Compensation Division of the Department of Labor and Workforce Development, testified by deposition concerning the second settlement. He authenticated a computer-imaged copy of an SD-1 form, which indicated that Employee had settled a claim for carpal tunnel syndrome against Harvard Industries in May 2000, based upon 25% permanent partial disability ("PPD") to both arms. The settlement had been approved by the Department of Labor, as permitted by Tennessee Code Annotated section 50-6-206(c) (1999). Mr. Murrell testified that additional documents which should have been available in the Department's computer system could not be found. Although counsel for the Second Injury Fund made numerous objections during the deposition, the information was placed in the record, and no issue has been raised on appeal concerning its admission.

Employee was forty-three years old. He left school in the tenth grade, but later obtained a GED. He completed a program in electronics at a vocational-technical school. He had also completed two additional programs pertaining to maintenance of industrial robots. Prior to working for Employer, he owned an electronic repair business for a period of time. He had also worked in other factory settings, primarily performing maintenance upon electronic machines. He had supervised other employees in at least one of those jobs. He was terminated by Employer in November 2004, and had not worked since. He testified that, as a result of his injury, he was unable to perform many of the functions of his job for Employer, because of the amount of bending, twisting and lifting required. He reported that he had limited motion of his neck, and pain from his neck into both arms. He also had pain from his lower back into his leg. At the time of the trial, he regularly took four medications: Lortab, Lyrica, Tramadol and Robaxin.

The trial court found that Employee's injuries were compensable. It found that he had sustained an 85% PPD to the body as a whole due to these injuries. It further determined that his 1995 settlement represented 27.08% PPD to the body as a whole. The May 2000 settlement of 25% PPD to both arms is equivalent to an award of 25% to the body as a whole. The two prior awards therefore totaled 52.08% to the body as a whole. Employer was found to be liable for 47.92% PPD to the body as a whole. The trial court found that Employee's claim against the Second Injury Fund was barred by the statute of limitations. Employer was ordered to pay Dr. Parsioon's charges, which were the subject of an agreement of counsel during his deposition. The trial court declined to order the payment of other medical expenses, stating that the record contained no evidence that those charges were reasonable and necessary for the treatment of the injury. Employee filed a motion to alter or amended the judgment on several grounds. The trial court granted the motion in part by ordering Employer to pay for treatment rendered by Dr. Parsioon. The motion was otherwise denied. Employee has appealed, arguing that the trial court erred by finding that his claims against the Second Injury Fund were barred by the statute of limitations, by incorrectly calculating

the amount of PPD represented by his 1995 workers' compensation settlement, and by failing to order Employer to pay medical expenses other than those of Dr. Parsioon.

### **Standard of Review**

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Madden v. Holland Group of Tenn., Inc., 277 S.W.3d 896, 900 (Tenn. 2009). "When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues." Foreman v. Automatic Systems, Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

### **Analysis**

#### *1. Statute of Limitations - Second Injury Fund*

Employee contends that the trial court erred in its conclusion that his claim against the Second Injury Fund was barred by the applicable statute of limitations, Tennessee Code Annotated section 50-6-203(a). In its findings, the trial court noted:

[Employee] was injured on April 23, 2004. September 9, 2004 was the last day that he received treatment from the employer's approved doctors. The original complaint against the employer and the insurance carrier was filed on December 28, 2004. The last voluntary medical payment by the insurance carrier was on January 10, 2005.

The "Motion to Add the Second Injury Fund as Defendant" was filed on August 2, 2006. The "Amended Complaint" against the Second Injury Fund was filed on August 22, 2006.

The court then cited Norton Co. v. Coffin, 553 S.W.2d 751 (Tenn. 1977), and Imperial Shirt Corp. v. Jenkins, 217 Tenn. 602, 399 S.W.2d 757 (Tenn. 1966), for the proposition that the statute of limitation for a workers' compensation claim is suspended "until by reasonable

care and diligence it is discoverable and apparent that an injury compensable under the workmen's compensation laws has been sustained." Norton, 553 S.W.2d at 752. Examining the record before it, the trial court determined that Employee had reason to believe that he had sustained a compensable injury no later than December 28, 2004, the date upon which he filed his complaint which alleged that he had sustained such an injury. On that basis, it concluded that the one-year statute of limitations contained in Tennessee Code Annotated section 50-6-203(a) (1999) had run, and Employee's claim against the Fund was therefore barred.

Employee contends that the statute of limitations did not begin to run until Dr. Parsioon assigned a permanent impairment rating in April 2006. He states in his brief that "the allegation contained in [his] Complaint [of] December 28, 2007 [sic] was mere boiler plate which would be contained in every workers' compensation complaint." He cites Nelson v. Norandal USA, Inc., No. W2005-02312-SC-WCM-CV, 2006 WL 2924817 (Tenn. Workers' Comp. Panel Sept. 26, 2006), in support of his position. In Nelson, the employee sustained a traumatic injury in 1978. Subsequently, he gradually developed arthritis in the affected joint. The arthritic condition was aggravated by his work activities. The Panel reversed a trial court's dismissal of an action, holding that the employee did not know of his second, gradual, injury, until a medical examination which occurred after the filing of the complaint. Id. at \*2-4.

Employer, and the Fund, argue that the complaint in this case alleges the existence of permanent disability, and that Employee therefore, by definition, had that knowledge on the date the complaint was filed. The Fund points to Tennessee Rule of Civil Procedure 11.02(3), which provides that, by signing a pleading, a party or his attorney certifies that the "factual contentions [in the pleading] have evidentiary support," or "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." The Fund also relies upon Pearson v. Day Int'l, Inc., 951 S.W.2d 375, 378 (Tenn. 1996). In that case, as in this, the employee added the Fund as a party to his lawsuit more than one year after filing his complaint. The Supreme Court upheld the dismissal of the action as to the Fund, rejecting the employee's argument that the limitation period did not commence until he knew or had reason to know that he might be permanently and totally disabled. Id. at 378. See also Travelers Ins. Co. v. Austin, 521 S.W.2d 783, 786-7 (Tenn. 1975). The Fund also argues that Nelson, and other cases relied upon by Employee, are distinguishable because in each case the issue was whether or not the action had been commenced within the limitation period, not whether the Fund had been added as a party within the limitation period.

A contention similar to that raised by Employee was recently considered by the Special Workers' Compensation Appeals Panel in McNeely v. UCAR Carbon Co., Inc., No. M2008-02407-WC-R3-WC, 2009 WL 4642630 (Tenn. Workers' Comp. Panel Dec. 9, 2009).

In that case, the injury occurred after the 2004 amendments to the workers' compensation law, which *inter alia*, required the parties to exhaust the benefit review process before filing suit. Tenn. Code Ann. § 50-6-203(a) (2005). The injured employee timely filed his Request for Benefit Review Conference, and timely filed suit against the employer after that process was completed. However, the Second Injury Fund was not a party to that process and was not named in the lawsuit. 2009 WL 4642630 at \*3. Several months after the filing of the lawsuit, and more than one year after the date of the injury, the employee sought to add the Fund as a defendant. The Fund's motion to dismiss based upon the expiration of the statute of limitations was denied by the trial court. The employee in McNeely argued, much as Employee in this case, that the statute of limitations did not begin to run as to the Fund until he had knowledge, or reason to know, the full extent of his injuries. Id. The Panel rejected this argument, reversed the trial court, and dismissed all claims against the Fund. Id. at 4. In doing so, the Panel noted that "the language of the original complaint" undercut the employee's argument.

We conclude that Pearson, Travelers, and McNeely are applicable here. Employee was aware of his previous awards at the time he filed suit against Employer. His complaint alleged that his work injury had caused him to sustain permanent partial disability. Employee's arguments to the contrary, we find that the record clearly supports the conclusion that he knew, or reasonably should have known, of the existence of his potential claim against the Fund at the time his complaint was filed. Therefore, under the circumstances present, the statute of limitations applicable to that claim had expired before he sought to add the Fund as a party to this action. The trial court correctly dismissed Employee's claims against the Fund.

## *2. Valuation of Prior Settlement*

This issue concerns Employee's 1995 settlement of his claim against Cadillac Curtain Company for a back injury. The order approving the settlement was placed into the record. The order does not set out a percentage of disability. It does, however, state that the amount of the settlement was \$13,000.00, that Employee's workers' compensation benefit rate was \$120.00 per week, that all authorized medical benefits and temporary disability benefits had been paid, and that an additional \$1,000.00 was being paid to close future medical benefits. The trial court determined that the entire \$13,000.00 was attributable to PPD. It divided that amount by \$120. The result, 108.33 weeks, is equivalent to 27.08% PPD to the body as a whole. That figure was used to determine Employer's liability under Tennessee Code Annotated section 50-6-208(b).

Employee contends that this method of determining the amount of the settlement was incorrect. He testified that there were disputed medical expenses, which arose from tests or

treatment (the record is vague on the subject) for kidney stones, which he contended were related to that work injury. Employee testified that some of these expenses were paid from the settlement fund. He estimated that these expenses totaled \$4,000 to \$5,000. He further testified that the amount he received from his attorney was \$6,200.00. Employee argues that the trial court should have valued the settlement based upon \$8,500.00 (\$13,000.00 – \$4,500.00). He does not cite any statutory or case authority in support of his position.

Employer points out that Employee was only able to estimate the alleged medical expenses, and that the order approving the settlement makes no mention of unauthorized medical expenses. That order does refer to an alleged “urinary injury” in the early paragraphs, but does not explicitly find that injury, or expenses associated with it, to be causally related to Employee’s work injury. Viewing the record as a whole, as it applies to this issue, we are unable to conclude that the evidence preponderates against the trial court’s finding that the 1995 settlement represented an award of 27.08% PPD to the body as a whole.

### *3. Denial of Medical Expenses*

The trial court awarded expenses associated with Dr. Parsioon’s treatment. Dr. Parsioon was questioned about these expenses during his deposition. An off-the-record conversation took place between counsel. A transcript of that conversation was submitted by Employer in its response to Employee’s motion to alter or amend this part of the trial court’s order. The entire conversation reads as follows:

MR. BOREN [Counsel for Employee]: Michael, do I have to -- technically, of course, this has not been paid under comp. Do I have to jump through the hoops on reasonableness and necessity of *this bill*?

MR. CARTER [Counsel for Employer]: No.

MR. BOREN: Okay, and we’ll just attach it.

MR. CARTER: That will be fine.

MR. BOREN: And we’ll deal with that.

MR. CARTER: I assume he’s going to say the bill is reasonable and necessary.

MR. BOREN: I would strongly suspect.

THE WITNESS [Dr. Parsioon]: Mine. *I might not testify for the hospital or the x-rays, none of that.* The only thing about the neck that I know is that I had one little neck fusion myself, so I know how much they charge.

(Emphasis added).

Based upon that excerpt, the trial court found that Employer agreed to stipulate only to Dr. Parsioon's expenses. The doctor stated that he would testify that they were reasonable and necessary. The agreement did not explicitly refer to any other expenses. Dr. Parsioon stated that he would not be able to testify as to the reasonableness of any charges other than his own. Employee did not submit any proof at trial that those other expenses were reasonable and necessary. As the trial court noted, a list of the actual expenses at issue existed, but was never placed into evidence. Under these circumstances, we cannot conclude that the evidence preponderates against the trial court's conclusion that the stipulation entered into during Dr. Parsioon's deposition was limited to his charges. There is no evidence in the record of the particular expenses which Employee seeks to have Employer held liable for, the amount of those expenses, or that those expenses were reasonable and necessary for the treatment of Employee's work injury. Based upon those factors, we find that the evidence does not preponderate against the trial court's decision on this issue.

### **Conclusion**

The judgment of the trial court is affirmed. Costs are taxed to Timothy Todd and his surety, for which execution may issue if necessary.

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JAMES F. BUTLER, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE  
AT JACKSON

**TIMOTHY TODD v. MTD CONSUMER GROUP ET AL.**

**Chancery Court for Lauderdale County  
No. 13148**

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**No. W2008-02707-SC-WCM-WC - Filed May 13, 2010**

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**ORDER**

This case is before the Court upon the motion for review filed on behalf of Timothy Todd pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Timothy Todd and his surety, for which execution may issue if necessary.

PER CURIAM

CORNELIA A. CLARK, J., not participating.